

# I. Introduction: “The Justice of the Common Law”

## A. Unjust Laws

Unjust laws have troubled lawyers, political scientists, and philosophers since they first reflected on the legal standards by which people govern themselves. Unjust laws raise difficult questions about our understanding of law, our aspirations for our laws, our obligations to one another, and our government’s responsibilities to each of us. From Aristotle and Aquinas to Hart and Fuller, the debate about these questions has continued for millennia, and it will endure for as long as people need law to order their societies and to guide their lives.

There are several ways that a law might be unjust. It might prohibit or curtail conduct that should be permitted.<sup>1</sup> It might permit conduct that should be prohibited.<sup>2</sup> It might apply or enforce unfairly an otherwise unobjectionable law.<sup>3</sup> People can and will disagree about whether and in what way a particular law is unjust. I do not, however, wish to enter into that debate. For the purposes of this study, I want to posit a particular law as unjust and then ask by what legal basis, if any, a judge can resist and attempt to correct that injustice. It seemed to me that it might help clarify discussion to have a specific example of an unjust law in mind. The example of an unjust law that I will use in chapter 7 is one permitting government-sanctioned racial discrimination.<sup>4</sup> I will not attempt to defend the claim, if a defense is needed, that racially discriminatory laws are unjust.<sup>5</sup> I assume it for the purposes of my argument. Of course, someone might imagine a polity in which racially discriminatory laws are not necessarily unjust by

definition. I am, however, interested in existing common law systems. My selection of racially discriminatory laws as paradigmatically unjust refers to the related experiences of common law nations regarding, for example, treatment of indigenous populations and the political and constitutional history of the United States with respect to slavery and legalized racial segregation and subjugation.

In addition to overtly or substantively unjust laws, certain laws also attempt, in various ways, to undermine the institutional position or constitutional obligations of common law courts. In chapters 8 and 9, I examine some specific examples of this type of law as well.<sup>6</sup> I analyze cases in which judges responded to these laws and refused to allow the integrity and authority of their courts to be enervated in this manner. In these discussions, I highlight specific fundamental common law principles that operate through judicial decisions to maintain the constitutional relationship of government organs and to enforce legal limitations on government action.

Despite the long history of interest in problems presented by unjust laws, relatively little has been written about the particular difficulties these laws raise for judges called on to enforce them. What little has been written tends to oversimplify or misconceive the genuine nature of the conflict unjust laws pose for judges.<sup>7</sup> My goal is to offer another way of looking at the conflict created by unjust laws and at judicial responses to it.

## B. The “Moral-Formal Dilemma”

People generally assume that unjust laws create a conflict between a judge’s moral obligations as a person and her legal obligations as a judge.<sup>8</sup> More specifically, these laws, it is said, force a judge to choose between her human obligation to resist iniquity and her legal obligation to enforce the law as it is. In his book *Justice Accused*, Robert Cover described the cognitive dissonance experienced by some abolitionist judges when faced with unjust laws as the “moral-formal dilemma.”<sup>9</sup> Cover used laws permitting slavery, in particular the Fugitive Slave Act of 1850, as his example of unjust laws that gave rise to the moral-formal dilemma for judges who were, at least while they were off the bench, abolitionists, such as Joseph Story.

In one sense there was a general, pervasive disparity between the individual’s image of himself as a moral human being, opposed to human slavery as part of his moral code, and his image of himself as a faithful

judge, applying legal rules impersonally—which rules required in many instances recognition, facilitation, or legitimization of slavery.<sup>10</sup>

As Cover documents in his book, most of these judges resolved this conflict by taking the formal route, enforcing the act, and relying on platitudes about “fidelity to law”<sup>11</sup> or judicial deference and restraint required by the separation of powers.<sup>12</sup>

In his review of *Justice Accused*, Ronald Dworkin claims that Story and other abolitionist judges enforced laws they believed to be unjust because they rejected notions of natural law that might have provided a basis in fundamental legal principle for refusing to uphold the Fugitive Slave Act.<sup>13</sup> As others have noted, the judicial rejection of natural law asserted by Dworkin is historically baseless.<sup>14</sup> Nonetheless, as Anthony Sebok explains, “Cover’s conclusion is that the leading legal theory of the age—legal positivism—so dominated these judges that they could see but not act upon the appeals made from natural law in their courtrooms.”<sup>15</sup> As I will discuss later, Gustav Radbruch leveled a similar charge against positivism for fostering an environment in which the Nazi government could subvert the legal principles and constitutional values of Weimar.<sup>16</sup> Dworkin argues that judges who felt trapped by the moral-formal dilemma, such as Story, were in this predicament because they “had abandoned a theory of law . . . [according to which] the law of a community consists not simply in the discrete statutes and rules that its officials enact but in the general principles of justice and fairness that these statutes and rules, taken together, presuppose by way of implicit justification.”<sup>17</sup>

Undoubtedly, Dworkin has his own theory of law in mind as the alternative that would have permitted abolitionist judges to invalidate the Fugitive Slave Act without resort to natural law theory. Dworkin argued that the Fugitive Slave Act violated the U.S. Constitution, because of the Constitution’s conceptions of individual freedom, procedural due process, and federalism.<sup>18</sup> Sebok argues convincingly, however, that Dworkin’s claims are fundamentally inconsistent with the relevant constitutional language and history, state laws then existing, and important state and federal precedent.<sup>19</sup> Sebok also offers a reconstruction of Dworkin’s argument that might support his conclusion about the unconstitutionality of the Fugitive Slave Act.<sup>20</sup> Moreover, in a later essay, Sebok further develops his argument about the unconstitutionality of the Fugitive Slave Act by demonstrating that Lord Mansfield’s famous decision in *Somerset v. Stewart*,<sup>21</sup> which effec-

tively ended slavery in England,<sup>22</sup> was incorporated into American law by precedent and statute.<sup>23</sup> Significantly for the argument I will develop, Sebbok emphasizes in this later piece the importance that influential early American judges placed on authoritative sources for judicial reasoning and decision making in accordance with the common law.<sup>24</sup>

I will return to aspects of Dworkin's theory in later chapters. For now, I just want to mention that I agree with his statement (although not with the underlying argument in his review of *Justice Accused*) concerning the importance of "general principles of justice" to judicial decision making in cases involving unjust laws. For reasons I explain later, I believe a defense of the use of these principles by judges in these cases demands a more exacting theoretical and doctrinal explanation than Dworkin provides of their source and use in accordance with the method and history of the common law.

The moral-formal dilemma is not just a means of describing the quandary in which certain nineteenth-century American judges found themselves. The moral-formal dilemma has been so well and thoroughly osmosed by modern lawyers, judges, and scholars that we do not even question it anymore. But this is a mistake, and it has led contemporary legal and political theorists to further errors.

### C. Unsatisfying Answers

Theorists conditioned to think only along the moral-formal axis assume that a judge faced with an unjust law has only three unpalatable options: "he would have to consider whether he should actually enforce it [the unjust law] . . . or whether he should lie and say that this was not the law after all, or whether he should resign."<sup>25</sup> To me and to others,<sup>26</sup> this Hobson's choice is deeply troubling. Looking through moral-formal eyes, though, no other options are available to a judge in this situation.

These theorists agree that, morally speaking, judges should refuse to enforce the law. But these theorists also agree that judges do so only at the expense of their countervailing legal duty to apply the law as they find it.<sup>27</sup> Some are willing to accept this form of civil disobedience practiced from the bench. In fact, some theorists claim that a judge's moral duty to resist injustice justifies his subverting the judicial process by telling legal lies about the actual bases for his decision.<sup>28</sup>

The problem is that, with moral-formal eyes, there seems nothing else a judge can do, legally speaking, to refuse to enforce unjust laws. There is

another possibility, however. There are legal arguments that support a common law judge's ability and obligation, as a judge, to refuse to enforce unjust laws.

#### D. An Alternative

The moral-formal dilemma is, to my mind, a false dichotomy. It proceeds from an incomplete understanding of the judicial function to an impoverished account of judicial obligation. As the term indicates, the legal side of the dilemma provides judges with only a formalistic account of their legal authority and responsibilities. This limited, formal view sees the judge's legal authority as limited solely to the enforcement of the law as it is. But this is not a complete picture of the common law judicial function. Once the full extent of a judge's legal authority is considered, the dilemma's formulation can be corrected, and the problem can be reconsidered.

I argue that unjust laws do not create a moral-formal or moral-legal dilemma; they create a legal-legal dilemma. Unjust laws create a conflict between two of a common law judge's most fundamental legal obligations: to apply the law and to develop the law. The crucial point for my purposes here is that I intend to provide a legal, rather than a moral, justification for judges to refuse to enforce unjust laws without resigning or resorting to prevarication.

I begin my argument in chapter 2 with a general discussion of the common law as a legal system, a judicial method, and a body of doctrine and principle. In that chapter, I explain the understanding of legal sources that I use throughout my argument. I then consider the judicial process and its central importance to the common law legal system and tradition. In doing so, I refer to the doctrines of precedent and to what Roscoe Pound and others refer to as the "supremacy of law." These doctrines function as descriptive indicators of common law systems, both in terms of the sources used in legal argumentation and in terms of the function of courts and law in defining and restraining the breadth of government power. Pound traced the doctrine of supremacy of law to Edward Coke's opinion in *Dr. Bonham's Case*.<sup>29</sup> Pound's reference to *Bonham* in relation to the supremacy of law connects directly to my discussion in chapters 5 and 6 of *Bonham* as a seminal legal source in the common law tradition for the establishment of judicial review and to my discussion in chapters 8 and 9 of the Anglo-American constitutional commitment to rule-of-law values. I also explain in chapter 2 that the doctrines of precedent and supremacy of law apply to

the internal and external processes of adjudication and that the common law judicial process applies to all categories of adjudication, including cases involving statutory construction or constitutional interpretation. Chapter 2 concludes with an examination of various jurisprudential approaches to the identification of the law's content and the relationship of that content to its moral worth. More specifically, I address the perspectives of inclusive and exclusive positivism concerning this issue, along with the views of Ronald Dworkin. In reviewing these different theoretical perspectives, I hope to highlight the ways that they intersect with my argument in this book and the ways that they do not.

I then turn, in chapters 3 and 4, to the arguments for the judicial obligation to apply the law. In this discussion and in the later one for the judicial obligation to develop the law, I pursue two distinct but complementary lines or types of argument. The first line of argument relies on "legal sources" as I define that term in chapter 2. The second line of argument is conceptual—that is, based on the concept of the common law itself. These arguments are presented, as lawyers sometimes say, "in the alternative," meaning that the arguments are independent of one another<sup>30</sup> and that the reader is free to accept either one or both of them.

My analysis of the judicial obligation to apply the law starts, in chapter 3, with the source-based argument. It seems to me that the doctrine of *stare decisis*<sup>31</sup> grounds part of the judge's fundamental legal obligation to apply the law, when the law is found in judicial decisions. I explore the bedrock importance of *stare decisis* to the common law tradition and explain that, to have any meaningful effect on judicial decision making, *stare decisis* must sometimes (or often) require a judge to abide by precedent even where the judge would prefer to reach a different result. I examine the attempts by several theorists to avoid the repercussions of *stare decisis* when the doctrine demands that judges produce unjust rulings. I argue that each of these attempts fails because it attempts to avoid the strictures of *stare decisis* by denying its genuine force and prevalence. I argue that the only way to claim that *stare decisis* can yield in a given case is to locate an equally important and equally fundamental common law principle that will permit judges to avoid injustice. This principle is to be found in the judicial obligation to develop the law.

The second prong of the source-based argument for the judicial obligation to apply the law concerns legislative supremacy. Just as *stare decisis* requires judges to apply case law, legislative supremacy requires judges to enforce statutes. To some extent, this might seem more a matter of institu-

tional interaction or political ideology. As I discuss in the second half of chapter 3, however, the judicial recognition of legislative authority to enact binding law results in the force of legislative supremacy as a legal constraint and not just as a political fact. I then examine, as I did with *stare decisis*, some attempts by scholars to avoid the constraints of legislative supremacy when it compels judges to enforce unjust statutes. As with *stare decisis*, I argue that these attempts to avoid legislative supremacy are merely attempts to reconstitute legislative supremacy, usually through the pretext of statutory interpretation, rather than efforts to meet the doctrine head-on. And as with *stare decisis*, I argue that legislative supremacy can be superseded only by a similarly foundational judicial obligation to develop the law.

After examining the source-based legal support for the judicial obligation to apply the law, I offer a short argument in chapter 4 to establish a judicial obligation to do so that is based on the systemic role occupied by common law judges. In that chapter, I observe that the common law method requires judges to engage in certain modes of reasoning that involve reference to and reliance on recognized, authoritative legal sources. When judges depart from the rules found in these sources, they are required to provide a justificatory explanation for this departure. This definition of the judicial role and this method of legal reasoning ordinarily result in judges applying the law as it is, because there is no legitimate legal basis for deviation or alteration.

Next, I begin my argument for the judicial obligation to develop the law by refusing to enforce unjust laws. As with the discussion of the judicial obligation to apply the law, I present a source-based argument and a conceptual argument. The source-based argument begins in chapter 5, with an extended examination of Coke's decision in *Bonham*. Academics debate the proper understanding of this case. Some claim that Coke intended his opinion to serve as a legal justification for judicial review of primary legislation as that doctrine would later develop in the United States. Others assert that Coke meant to offer nothing more than a statement of statutory construction, which posed no threat to the orthodoxy of English parliamentary sovereignty. Relying on the political climate of Coke's day, watershed events in Coke's life, analysis of case law, and the subsequent influence of the decision, I defend the first reading of *Bonham*. In particular, I defend a reading of *Bonham* as the historical and theoretical basis for judicial review of legislation according to common law principles rather than a canonical constitutional text.

After considering *Bonham*, I analyze statements by Lord Mansfield in

*Omychund v. Barker*.<sup>32</sup> *Omychund* is important to me for several reasons. First, it was in this case that Lord Mansfield articulated the idea that the common law “works itself pure.” The case provides an excellent example of this aspect of the common law judicial process. In addition, the case relates to the applicability of the common law judicial process to all types of case: constitutional, statutory, and decisional. Finally, I connect Lord Mansfield’s statements in *Omychund* to Lord Coke’s decision in *Bonham* as a means of locating important affinities in their thought about the common law, specifically about the relation between reason and justice and the correlation between developing the law and correcting injustice through the application of reason in the adjudication of legal disputes.

I then shift my focus, in chapter 6, from England to the United States. Looking at American state and federal cases from the late eighteenth and early nineteenth centuries, I argue that the doctrine of judicial review as it developed during the formative years of the American Republic was not limited to evaluation of legislation in light of a written constitution. Instead, American courts used the common law and the Constitution as alternative bases for judicial review. Moreover, some state courts relied explicitly and implicitly on Coke’s *Bonham* decision as the legal foundation for this judicial authority. I explain further that the U.S. Supreme Court and Chief Justice John Marshall himself continued to refer to constitutional and common law justifications for judicial review even after the *Marbury* decision.<sup>33</sup> I also explain that prominent American lawyers and judges of this period recognized a doctrinal and theoretical distinction between common law and natural law as bodies of principle and bases for judicial decision. I argue that the line of cases beginning with *Bonham* and traced through these early American decisions represents a coherent doctrine of judicial review based on common law principles rather than constitutional provisions. I refer to judicial review grounded on common law principles as “common law review” and to judicial review reliant on a constitutional document as “constitutional review.” I also argue that this doctrine of common law review engenders a judicial obligation to develop the law by refusing to enforce laws determined to violate these principles, in much the same way that constitutional review requires judges to refuse to enforce laws determined to violate a constitutional provision.

After concluding the source-based argument in favor of a judicial obligation to develop the law, I begin the conceptual argument in chapter 7. This argument attempts to show that a judicial obligation to develop the law is inherent in the common law judicial role. In other words, I argue

that a legal system cannot accurately be called a common law system unless its judges' function is understood to include a responsibility to develop the law through the adjudicative process. This argument has four parts: (1) the common law is designed to develop over time; (2) this development involves the effort to achieve substantive justice; (3) according to the common law tradition and method, judges are the institutional actors charged with ensuring that this development takes place; and (4) when judges fail to achieve this objective, drastic negative consequences sometimes result. In advancing this argument, I employ the change in American law involving racial segregation as an example of the developmental design of the common law and of the judicial role and responsibility in that process of development.

After presenting these two complementary arguments in favor of the judicial obligation to develop the law, I try, in chapter 8, to explain some analytic features of that doctrine as it might operate in practice. In doing so, my goal is to demonstrate that common law review is a workable legal doctrine that can be used by real judges when deciding cases involving unjust laws. I outline the different forms that this judicial authority might take and different judicial attitudes toward its exercise. I then explore the interaction of common law review with the institutional and constitutional doctrines of *stare decisis* and legislative supremacy. Next, I connect the exercise of common law review to the existence of common law constitutionalism. An important aspect of this discussion is its demonstration of the importance of common law review in contemporary English and American constitutional law and theory. By examining cases in which judges apprehend a significant threat to the institutional autonomy of their courts, I describe specific situations and broader circumstances where common law review remains a viable and vital doctrine on which judges can and do rely in maintaining the integrity of the judiciary in the face of jurisdictional incursions by legislation, precedent, and executive action. These cases are especially important because a possible reaction to my argument is that the historical and doctrinal relevance of common law review has been obviated by the incorporation of the principles and practice of common law review, at least in U.S. law, through more recent interpretations of the due process and equal protection provisions of the Fourteenth Amendment. To the extent that this may be true for the more apparent instances of substantively unjust laws, the cases I analyze in chapters 8 and 9 demonstrate the contemporary salience of common law review in the United States and in the United Kingdom. Chapter 8 con-

cludes with a response to the so-called Radbruch formula and highlights important distinctions between my argument and Radbruch's.

In chapter 9, I examine the possibility of introducing common law review in two common law regimes, England and the United States, the common law world's least and most hospitable habitats, respectively, for the doctrine. I consider the obstacles to the incorporation of common law review posed by, in particular, the English doctrines of *stare decisis* and parliamentary sovereignty. I argue that, properly understood, the English legal tradition and some recent English case law support the application of common law review in English courts—at the very least, in the House of Lords. Focusing principally on a recent House of Lords decision, I demonstrate the existence and operation of a fundamental common law principle that operates in English law to maintain fundamental commitments to constitutionalism and judicial protection of individual liberties through the review of government action.

Where the United States is concerned, I note in chapter 9 that the absence of some English hurdles eases the potential acceptance of common law review, although I recognize that there would be objections in America as well. I argue in chapter 9 that the Anglo-American constitutional commitments to the rule of law are more fundamental and meaningful than the apparent distinctions drawn from the presence or absence of a written constitution or from references to legislative supremacy. My emphasis here is on the shared constitutional values entrenched in the common law principles enforced by English and American courts when reviewing the legality of government action. And I emphasize the common law foundations of the constitutional protections articulated in the U.S. Constitution. The proper understanding of the Constitution at the time of ratification and today depends on an appreciation of the document as a reaffirmation of a commitment to fundamental common law rights and principles rather than a reconstruction or restriction of the nature and meaning of these principles. This shared common law tradition is what truly harmonizes and best informs Anglo-American constitutional thought and meaning.

Now that I have outlined this book's argument, it might be useful to address a couple of potential concerns about my project before revisiting the moral-formal dilemma and explaining some advantages of my method of analysis. My argument is limited to the common law's tradition, method, and sources. This is because the distinction between the common law and civil law traditions may be relevant when analyzing the ability and obligation of judges to refuse to enforce unjust laws. This distinction has been ig-

nored by those theorists who have addressed the topic, and it seems to me that it might be worthwhile to consider whether common law judges and civil law judges operate under different constraints when asked to enforce unjust laws in their courtrooms. Let me stress that I am not asserting in any way that common law systems and the common law tradition are inherently more just than civil law systems and the civil law tradition. I mean only to suggest that the distinction is worth considering when thinking about how the different systems and traditions address, from an institutional perspective, the problems posed by unjust laws. My argument is an effort to address the common law portion of that broader inquiry.

Another issue of concern relates to the jurisprudential commitments that underlie my arguments. Legal theorists often like to determine what you are before deciding what they think about your position. Theorists frequently want to know whether a person is a legal positivist, a natural lawyer, or whatever, as a means of understanding that person's more specific arguments. I dislike this tendency and will resist it here. Nevertheless, I will not be coy about my arguments. I have explained that I present a source-based and a conceptual argument to support the judicial obligation to develop (or to apply) the law. Where the source-based argument is concerned, I concede that those individuals, if there are any, who do not believe that authoritative legal sources play a pivotal role in legal reasoning may conclude that my source-based argument is deficient as a result of its reliance on these sources. Where my conceptual argument is concerned, some people might think that I am arguing for a norm or rule of common law systems, one according to which judges are legally authorized to refuse to enforce egregiously unjust laws. I have no particular objection to conceiving of the argument in this way. I just wish to point out that this is not the only way to conceive of the argument. The argument is also amenable to those who do not perceive law as reducible to norms or rules. And for people of this inclination, there is no need to view the conceptual argument in terms of a norm or a rule.

Once the judicial obligation to develop the law by refusing to enforce unjust laws is established, the moral-formal dilemma can be reevaluated. The "formal" side of the dilemma can be viewed, less pejoratively and more appropriately, as the legal obligation to apply the law. Even more important, though, we can see that the other side of the dilemma is occupied not by a sweeping, human, moral obligation to oppose injustice but, instead, by a specific, judicial, legal obligation to develop the law. We can begin to see the dilemma posed by unjust laws as a legal-legal dilemma. Viewing the

dilemma from this antinomic perspective has several advantages. First, judges and theorists may no longer be hidebound by the narrow view of judicial responsibility and authority presupposed by the formal side of the dilemma. Instead, this richer, more balanced account of common law judicial obligation allows us to appreciate that a judge's legal obligations are not encompassed and exhausted by the singular obligation to apply the law. There is more that a judge can do, from a legal standpoint, to correct injustice and to improve the law. Construing the dilemma as a conflict of legal obligations and fully apprehending the character and extent of these legal obligations allow us to see that a judge is not stepping outside the law by refusing to enforce unjust laws. By refusing to enforce an unjust law, the judge is changing the law in accordance with the common law's sources, methods, and traditions.<sup>34</sup>

Avoiding the moral-formal conception of the unjust laws dilemma will not eliminate disagreements about the law or about proper judicial decision making. But it will refocus the disagreement and our attention more precisely. Even those who accept that unjust laws create a legal conflict of judicial obligations may still disagree about whether a judge should properly have deferred to precedent or overridden a statute in a particular circumstance. But we must be careful to distinguish arguments about the morality of an action and the legality of a decision. In this regard, legal obligations are conceptually distinct from moral obligations.<sup>35</sup> When judges are confronted with unjust laws, moral convictions trigger or inform legal obligations. This is not to say, however, that moral obligations and legal obligations merge. They remain distinct, but related, in determining what a judge's legal responsibilities are.

## E. Types of Injustice

Finally, I should say something about the types of injustice to which my argument applies and those to which it does not. The discussion of unjust laws in this book is not an abstract analysis of the nature of justice (distributive, corrective, or otherwise), nor is it a search for the definitive algorithm that will allow all judges in all jurisdictions at all times to know when to exercise common law review. Instead, it is an examination of "legal justice" as that term is understood and applied by courts of common law jurisdictions to address legal wrongs by legal means through the award of legal remedies through legal judgments. In chapter 8, I discuss the epistemic evaluation necessary for judges to determine if a particular case is ap-

propriate for the exercise of common law review. At this point, I want to explain more generally the types of injustice to which common law review can properly be applied and the types of injustice that would be inappropriate for its application.

Judges operate in a legal, political, social, and historical context. Each common law nation has a differently configured constitutional and legal order that has defined and responded to its own unique political, social, and historical circumstances. And yet these nations also share, as common law nations, a mode of legal reasoning from legal sources, a form of judicial process, and a structure and relationship of legal institutions.<sup>36</sup> Only in accordance with this process, these institutions, and these sources can legal injustices be addressed by legal means. There are, needless to say, various forms of injustice in any human society and various ways that human beings attempt to correct these injustices. In what remains of this chapter, I will explain the distinctive nature of legal injustice to which common law judges might attempt to respond through judicial means. This is what might be called the “situated perspective” of the common law tradition.<sup>37</sup> I also hope to explain, principally by implication and correlation, other sorts of extralegal social injustice to which common law judges cannot properly respond in a manner consistent with their institutional role as judicial officials.

The common law tradition has long recognized a relationship between the moral evaluations of judges and the legal rulings of courts. But the common law has also always maintained a conceptual distance between “background morality”<sup>38</sup> and the articulation of legal rights in legal sources. The fact that legal rights often bear a relationship to moral conventions does not mean that all widely or strongly held moral beliefs will generate legal rights. For the argument I develop here, there must be some common law norm through which the judge’s moral conviction can honestly be expressed. Dworkin claims that a judge is “more likely” to recognize concrete legal rights where some preexisting legislative right exists.<sup>39</sup> But such a tendency does not seem sufficient to ground concrete legal rights in the sources of law and modes of reasoning that define the common law tradition. By saying that it is “more likely” that judges will rely on preexisting legal norms to articulate legal rights consistent with their moral evaluations, Dworkin intends to leave open the possibility that the moral evaluation alone, in certain instances, might be sufficient to construct “the best justification of legal practice” and, concomitantly, to determine “what rights people have to win law suits.”<sup>40</sup> Pushed to its limits, this view would

erode entirely the conceptual distinction between law and morality (or, at least, the separation of recognized legal sources from extralegal moral considerations). This may be Dworkin's view, although some of his other writings indicate that he would not permit judges simply to write morality into law with no mediating influence of historical and social context, institutional limitations, authoritative sources, and legal principles.<sup>41</sup> In any event, the argument made here does not permit judges simply to write their moral beliefs into law without any supporting legal principle or norm. But the common law tradition does, nevertheless, permit a more expansive role than is ordinarily assumed for the moral evaluations of judges in the correction of injustice, because the common law offers a remarkably rich vein of legal concepts and principles on which judges may draw when they confront unjust laws in their courtrooms.

For judges to exercise any form of judicial review (including common law review), there must first be an identified party who has suffered an injury susceptible of articulation as a legal wrong with a legal remedy available in a judicial forum. This is one important aspect of the discussion of recognized, authoritative legal sources for judicial reasoning. To exercise common law review, judges must determine that there is some legal source on which to draw in fashioning a legal remedy. Many, if not most, perceived social inequities do not fall into this category. This is ultimately a moral evaluation, but it is not solely a moral evaluation. For common law review to be exercised appropriately, this considered moral evaluation must be capable of expression in terms of a recognized legal source.<sup>42</sup>

Judges will undoubtedly disagree about whether an injustice exists, whether that injustice is a genuinely legal injustice, and whether that injustice is amenable to judicial rectification. In republican democracies, major policy initiatives are left primarily and properly to the legislatures for their legal expression. In chapters 3 and 8, I refer to this phenomenon as "legislative primacy." Moreover, in republican democracies, judges usually and properly defer to legislative pronouncements when rendering judgments. In chapter 8, I call this "deference as respect," following David Dyzenhaus. Legislative primacy and deference as respect, along with the institutional limitations of the judiciary (requiring a lawsuit, proper parties, recognized claims, available remedies, etc.), limit the scope and availability of common law review. In this discussion of justice, I can only offer a sense, rather than a definition, of the types of injustice that common law courts can properly attempt to correct. Although concrete definitions are often helpful analytic tools and have their place in the study of the common law,

they seem especially ill-suited to a discussion of the injustices to which common law judges may attempt to respond.

In describing the types of injustice to which common law judges may respond with legal means, the best place to start is with a somewhat self-evident but still crucial principle that unifies Anglo-American law (and the law of all common law jurisdictions): “The maxim that there is no wrong without a remedy does not mean, as it is sometimes supposed, that there is a legal remedy for every moral or political wrong. If this were its meaning, it would be manifestly untrue.”<sup>43</sup> For the purposes of my argument, this raises three related points: (1) not all social, moral, or political injustices are legal injustices; (2) according to the common law tradition, unless and until a form of injustice is expressed in a form of law, the judiciary cannot properly attempt to correct it; and (3) we need to discern very carefully which types of injustice have been incorporated into the laws of a given common law system. If (and only if) a type of injustice can be found in a legal source, then it becomes a proper subject for judicial evaluation, although it still may not be an appropriate occasion for judicial repudiation via common law review. As a result, judges must accept that they cannot do anything, as judges, to correct certain deeply felt social injustices that cannot fairly and honestly be said to have been expressed in legal form.<sup>44</sup>

An example from U.S. constitutional law may help to illustrate this point. One might ask whether a judge who believes capital punishment is morally wrong must still enforce the death penalty in her courtroom. The answer will depend on the judge’s ability to express the wrongness of capital punishment in terms of a concrete legal violation. A judge may not, on this account, refuse to enforce a penalty of death out of a deeply held religious conviction that capital punishment contravenes a biblical text.<sup>45</sup> However, in an appropriate legal framework, a judge could possibly refuse to enforce the death penalty because of a carefully reasoned legal conviction that capital punishment violates a constitutional text.<sup>46</sup> The point here is that, in both instances, there is a relationship between the judge’s legal conclusion and her moral conviction. But the crucial difference, which requires real introspection, intellectual honesty, and institutional caution on the part of judges, is the recognition that in the first case, the judge’s moral conviction rests ultimately on a religious text or tradition that is not recognized as an authoritative legal source.<sup>47</sup> To be sure, there could be (and are) legal systems in which a religious text is incorporated explicitly or by reference into a constitutional charter. In a system such as this, there might be no meaningful distinction between religious convic-

tions that are not expressed in legal terms and moral convictions that are. But in every existing common law system, this is not the case.<sup>48</sup> Tolerance for the free exercise of religion (and the prohibition against establishment of a state religion in the United States), constitutional protections for minorities, and the expression of legal concepts and rules in discrete terms prevent the conclusion that religious beliefs can catalyze judicial review. Reliance on a religiously based moral conviction exemplifies a category of perceived injustice to which my argument would not apply and underscores the relevance, at every stage, of reliance on, on the one hand, expressions of moral principle within legal sources, which can form a basis for common law review, and, on the other, expressions of moral principle external to legal sources, which cannot.

In the context of U.S. law, however, the moral convictions of a judge who finds capital punishment unconscionable can fairly be articulated as a legal violation of a specific constitutional provision. Justice William Brennan, a notable example of a judge who refused to enforce the death penalty, accentuated an interpretation of the constitutional text informed, without question, by a deeply felt moral conviction: "I view the Eighth Amendment's prohibition of cruel and unusual punishments as embodying to a unique degree moral principles that substantively restrain the punishments our civilized society may impose on those persons who transgress its laws."<sup>49</sup> Brennan consistently (or persistently) relied on this conviction and this interpretation of the Eighth Amendment in his repeated dissents from decisions of the Supreme Court that upheld capital sentences.<sup>50</sup> Some people (including some judges) will view this as an intransigent and perhaps irresponsible refusal to abide by the settled precedent of the Supreme Court. Brennan recognized this.<sup>51</sup> His response, like his reasoning, was consistent with the purpose and exercise of common law review: "[W]hen a Justice perceives an interpretation *of the text* to have departed so far from its essential meaning, that Justice is bound, by a larger constitutional duty to the community, to expose the departure and point toward a different path."<sup>52</sup> Brennan's reference to the text stresses the basis in a legal source for the expression of his moral conviction. Brennan limits his statement to the correction of a legal error in the course of issuing a legal judgment. Judges are not permitted to engage in freewheeling pronouncements of policy or principle in the absence of a live dispute *sub judice*. Common law review, like constitutional review, is available only where judges are engaged in the attempt to correct a legal injustice, and *only* a legal injustice.

Brennan's explicit invocation of the moral conviction that undergirded

his legal conclusion about the meaning of the Eighth Amendment is also entirely consistent with the method of common law review (although this example, of course, involves a constitutional provision rather than a common law principle). Again, the key here is the relationship between an individual judge's moral evaluation and the expression of that evaluation in an authoritative source. This would be a categorically different situation—and I would agree as to its inappropriateness—if Brennan had said, "I believe capital punishment is immoral, and so I will not enforce it in my courtroom." Judges must, at all times, engage in a form of legal reasoning and argumentation, which may incorporate or reference moral views, but always only in a manner consistent with the common law legal tradition and its method of reasoning.

The differentiation of religious convictions not grounded in legal texts from other moral convictions that are expressed in legal sources is, in many ways, a complex example. There are many other, more straightforward instances of social, political, economic, and other injustices that may likewise be perceived by certain judges as powerfully immoral but that are not expressed (and cannot in good faith be expressed) in terms of authoritative legal sources on which a judge can rely when exercising common law review (or constitutional review). Allan Hutchinson provides an example in his discussion of the problem of homelessness. Hutchinson says that attempts to engage with the common law at a theoretical level must seek to explain actual practice in particular instances rather than construct a grand theory that can explain the common law's proper response to injustice in whatever form. Hutchinson asserts that "available legal resources are sufficient to support a plausible argument that the common law could respond constructively, if not conclusively, to the plight of the homeless."<sup>53</sup> The problem is that Hutchinson does not tell us what those available legal resources are. In fact, Hutchinson concedes that established legal doctrine, "historical momentum," and the "deep moral integrity" of the common law may not support his argument and that such a response might never happen.<sup>54</sup> Hutchinson claims that an argument for correcting homelessness through the common law process of adjudication "is less about its legal validity and more about its political usefulness."<sup>55</sup>

I agree and disagree with Hutchinson. I agree that attempts to theorize about the common law must account for history, practice, and doctrine. I do not believe, however, that arguments about correcting homelessness (or any other injustice) through the common law process are more about political usefulness than legal validity. In fact, this impulse is at the root of

the problem when considering types of injustice to which common law judges may properly respond while respecting their institutional position and constraints. The recognition that there is not a legal remedy for every moral and political wrong means that certain social injustices must be addressed through other means, no matter how much we might sometimes wish we could frame them in legal terms that would permit judicial intervention.<sup>56</sup> When thinking about institutional and other public responses to social problems, treating political usefulness as more central than legal validity is not an attempt to understand the common law process and practice as it is. There may very well be a way to combat homelessness through the common law process, but that will involve respecting the common law courts as legal institutions and the common law method, which requires some basis in legal sources on which courts and lawyers can frame legal arguments.

In distinguishing the types of injustice that common law judges can attempt to correct through the exercise of common law review from other types of injustice that must be addressed in other ways, an example of a specific fundamental common law principle from English law is helpful. This chapter takes its title from a famous line in the *Cooper* decision: “although there are no positive words in a statute requiring that a party shall be heard, yet the justice of the common law will supply the omission.”<sup>57</sup> This principle has been applied broadly by English courts as a “vehicle of change” and “the engine of modern public law.”<sup>58</sup> In other words, English courts have applied the notion of the justice of the common law not just to implement and supplement parliamentary intentions but also to review government action and to impose substantive constraints on public power in accordance with the common law and English constitutional principles.<sup>59</sup>

The justice of the common law is a broad principle, but its application is necessarily case-specific and constrained by the institutional limitations of the common law courts. For example, a specific common law principle derived from the broader notion of common law justice is the right of access to the courts, which I mention in chapter 8. The right of access to the courts is a fundamental common law right, long recognized by English courts as possessing a constitutional dimension.<sup>60</sup> It is no accident that Justice Byles’s famous reference to “the justice of the common law” in *Cooper* arose in reference to the common law courts’ intrinsic institutional obligation to allow parties to be heard in court. In virtue of its expression as a pre-existing common law right recognized in authoritative legal sources, the

right of access to the courts, when infringed, is the type of injustice that could justify the exercise of common law review. Needless to say, the circumstances in which an asserted violation of the right of access to the courts will implicate the review authority of the courts inevitably depends on the particular characteristics of each case. All I want to explain now is that this is the sort of legal injustice to which common law courts may properly attempt to respond through common law review. And this sort of legal injustice is unlike other sorts of injustice, which are not historically and institutionally the purview of judges in the common law tradition.

With this in mind, we can return to Hutchinson's example of the problem of homelessness. Common law judges may not be well placed institutionally to address homelessness as a pervasive social ill, a dysfunction of policy implementation, or a failure for theories of distributive justice. However, the issue of homelessness helps us to consider other ways that common law judges can address issues related to poverty where they impede participation in the judicial process, which is the province of common law judges. Again, the goal here is not to formulate a litmus test for determining whether an issue related to poverty can be addressed judicially. Instead, I want to describe the sorts of problem courts can seek to correct through legal remedies in the judicial process.

English and U.S. courts have consistently held that people cannot be prevented from participating in the judicial process and asserting their individual rights. The historical and constitutional contexts are, of course, somewhat different in each nation, but the fundamental principle is the same. Accordingly, English and U.S. courts have refused to enforce statutory provisions that would require certain payments of court fees for poor litigants, because these statutes would violate the right to participate in the judicial process.<sup>61</sup> And U.S. courts and English law require counsel to be appointed for indigent defendants in criminal proceedings.<sup>62</sup> Of course, none of this is meant to suggest that the quality of participation in the judicial process does not vary according to the participants' respective financial means. Indeed, that is precisely the point. The courts cannot ensure that each litigant enjoys the same qualitative experience in court as every other litigant any more than the courts can ensure that wealth will not substantially impact people's lives outside the courthouse. Not all social, economic, and political injustices are legal injustices that permit judicial solutions. However, the Anglo-American legal tradition and substantive law do empower courts to ensure that everyone is entitled to a basic right of participation in the judicial process, so that those injustices that are fairly cat-

egorized as legal can be addressed through processes of legal argumentation and adjudication. Common law courts must preserve values and interests amenable to the judicial process and leave other areas of life to other institutions and processes of government.

Lon Fuller described the incongruity of attempting to correct certain nonlegal injustices through the judicial process as attempting “to accomplish through adjudicative forms what are essentially tasks of economic allocation.”<sup>63</sup> As Fuller points out, statutory rights may be created for the provision of a minimum wage, job security, or procedures for dispute resolution. And alleged violations of these statutory rights may be heard in court. But as Fuller also explains, the creation of certain legal rights to limited economic protections “do[es] not change the essential nature of that calculation [as economic rather than judicial].”<sup>64</sup>

Distinguishing between types of injustice that can be addressed through the common law judicial process and those that cannot also touches on the infelicity of thinking of unjust laws through the moral-formal rubric. Whatever the merits of his more general theory, Fuller’s recognition of the internal domain of law helps him (and us) to see that the circumscription of this domain “affects and limits the substantive aims that can be achieved through law.”<sup>65</sup> In other words, seeing that unjust laws create a conflict internal to law for judges also helps us to see that there is more that judges can do within the legal domain to correct legal injustice, while at the same time reminding us that not all injustices are legal injustices that can be corrected by judges within the legal domain.

For an injustice to be the sort of injustice to which judges might respond via common law review, at least three elements must be met. First, the injustice must be expressed in the form of some legal source or government act that can give rise to a litigated dispute over legal claims with an available legal remedy recognized at common law. Second, the moral convictions of the judge confronting the unjust law must also be traceable to a legal source. By this I mean that the judge must be able to express her moral disapprobation in terms of an existing common law principle, right, or norm violated by the unjust law. Third, the moral convictions of the judge offended by the unjust law must be capable of expression in a legal source. By this I mean that the judge must be able to express her moral disapprobation in the form of a legal ruling supported by a reasoned judicial opinion. More simply put, each of the three components of this analysis—the unjust law, the judge’s moral convictions, and the judge’s legal response—must be expressed in and as a form of law. Accordingly, despite likely ob-

jections, the proper exercise of common law review does not permit unconstrained attempts by judges to write their personal moral beliefs into the law. The proper exercise of common law review only permits judges to respond to legal injustices through legal means by reference to legal sources. Common law review cannot, therefore, be invoked by a judge in response to perceived affronts to abstract or extralegal visions of social justice, religious doctrine, natural rights, or economic theory.

It is unsurprising that theorists steeped in the moral-formal dilemma, who assume that a judge's moral duty trumps his legal duty in cases involving unjust laws, conclude that a judge's only options in these cases are such unjudicial things as deliberate misrepresentation or the enforcement of injustice. Under the assumptions of the moral-formal dilemma, his legal obligations toward litigants, the integrity of the judicial process, and the health of the legal system have evaporated. But once the dilemma is instead viewed as a conflict of legal obligations, we suddenly find that his work as a judge is not done; he still has legal responsibilities to the parties, the public, the process, and the system, all of which have invested him with more expansive and solemn obligations.